Mesubed v. ROP, 10 ROP 62 (2003)

ELMIS MESUBED, FRANCISCO MELAITAU, MOSES SAM, INACIO SADANG, RUSSELL MASAYOS, AUGUSTO RENGUUL, and LAZARUS INACIO,
Appellants,

v.

REPUBLIC OF PALAU,
Appellee.

CIVIL APPEAL NO. 02-28
Civil Action No. 01-261

Supreme Court, Appellate Division
Republic of Palau

Argued: December 2, 2002
Decided: February 20, 2003
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Counsel for Appellants: Johnson Toribiong

Counsel for Appellee: Everett Walton

BEFORE: LARRY W. MILLER, Associate Justice; R. BARRIE MICHELSEN, Associate Justice; DANIEL N. CADRA, Associate Justice Pro Tem.

Appeal from the Supreme Court, Trial Division, the Honorable KATHLEEN M. SALII, Associate Justice, presiding.

MICHELSEN, Justice:

Ngiwal State Governor Elmis Mesubed and six Ngiwal State legislators (the Legislative Defendants) were found personally liable for a violation of 40 PNC § 406(a), which imposes joint and several liability on government officials who expend, obligate, or certify public funds in excess of appropriations. We reverse the judgment against the Legislative Defendants,[1] because only those who "expend, obligate, or certify" expenditures may be held liable under section 406, and a legislative vote is neither an expenditure, nor an obligation, nor a certification, of funds.

FACTS

In September and October 2000, the State Government of Ngiwal spent $33,388.87 on "swearing-in ceremonies" for the inauguration of Governor Mesubed and the Ninth Kelulul a

[1]Although Governor Mesubed was the only Appellant identified by name in the Notice of Appeal, he raised no issues on appeal. Thus, we dismiss his appeal for lack of prosecution.

Kiuluul. Included in the expenditures were three round trip plane tickets to the Commonwealth of the Northern Mariana Islands, and a $320 donation to a "Ngiwal Club" in Saipan. Because there were no funds available in the state treasury, state officials dipped into accounts expressly reserved by the Olbiil Era Kelulau (OEK) for Ngiwal State capital improvement projects. Apparently over the objections of legislators Temol, Lakobong, and Tiobech, the Ngiwal Legislature had earlier enacted 9-1R-01 (NSPL No. 9-01), which purported to appropriate $30,000 for such swearing-in expenses from these already dedicated funds. The sum of $20,000 was taken from the portion of an OEK block grant that was irrevocably committed to capital improvement ⊥64 projects.[2] The remaining $10,000 was redirected from funds that had been designated for construction of a dock.[3]

On October 17, 2001, the Office of the Special Prosecutor (the Special Prosecutor or the Republic) brought suit against the Governor for spending the funds, as well as the legislators who voted in favor of NSPL No. 9-01. In its motion for summary judgment the Special Prosecutor argued that the conduct of the Governor and the Legislative Defendants violated 40 PNC § 406(a). The trial court agreed and awarded summary judgment in favor of the Republic.[4]

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[2]The source of these funds was RPPL No. 5-29, § 3.

The Republic argues that the Legislative Defendants' conduct was an unlawful "reprogramming" of funds. RPPL No. 4-10, § 30 included an unequivocal restriction on reprogramming any funds appropriated under RPPL No. 4-10, § 5, which was subsequently amended by RPPL No. 5-29, § 3. We believe, however, that the "reprogramming" argument is misdirected. "Reprogramming" is defined by 40 PNC § 302(m) as the "utilization of funds in an appropriation account for purposes other than those originally contemplated at the time of appropriation." While on its face this definition may seem to apply to the case at hand, 40 PNC § 351 explains the circumstances when reprogramming comes into play. Subsections (a) and (b) grant authority to the President to reallocate OEK-appropriated funds and U.S. grant funds; subsection (c) provides for some reprogramming authority of the President of the Senate and Speaker of the House of Delegates. Nowhere does the PNC define "reprogramming" in relation state officials. Thus, even if the funds were reprogrammable, state officials have no statutory authority to reprogram OEK-allotted funds.

[3]The source of these funds was, at least in part, RPPL No. 5-18, § 3(n), and had been previously appropriated for the dock by the State Legislature in NSPL No. 8-13.

[4]Although the statute imposes joint and several liability and the Special Prosecutor argued that the Governor be held liable for the entire amount, the trial court found the Governor liable only for $3,388.87. The Republic did not appeal this ruling and its correctness is not before us.

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STANDARD OF REVIEW

Appeals from summary judgment are reviewed *de novo*. All evidence and inferences are considered in the light most favorable to the nonmoving party. This Court considers whether the Trial Division correctly found that there was no genuine issue of material fact and that the moving party was entitled to judgment as a matter of law. *Dalton v. Borja*, 8 ROP Intrm. 302, 303, (2001); *Ngerketiit Lineage v. Tmetuchl*, 8 ROP Intrm. 122, 123 (2000). Our review is plenary, *Akiwo v. ROP*, 6 ROP Intrm. 105, 106 (1997), and includes both a review of the determination that there is no genuine issue of material fact and that the substantive law was correctly applied, *Anderson v. Liberty Lobby, Inc.*, 106 S. Ct. 2505, 2510 (1986).

DISCUSSION

The Legislative Defendants press a variety of arguments on appeal. They first argue that there are unresolved material factual issues that preclude summary judgment. They also suggest that the litigation presents a non-justiciable political question. Thirdly, they now pursue legislative immunity as an affirmative defense. Finally, the Legislative Defendants assert that § 406 does not apply to the act of voting. Although the first two arguments are without merit and ⊥65 require no discussion and the immunity argument was waived, the fourth argument has merit and we resolve this appeal on that ground.

The Affirmative Defense of Legislative Immunity

In their answer, the Legislative Defendants pleaded the affirmative defense of legislative immunity, but in their opposition to the Republic's summary judgment motion, the Legislative Defendants made no argument concerning legislative immunity. They wish to now press this affirmative defense on appeal, although they offer no explanation as to why this argument was not presented below.

Affirmative defenses are a matter for the litigant to raise, or not to raise, and may be waived. *See Robinson v. Bergstrom*, 579 F.2d 401, 404 (7th Cir. 1978) (holding that legislative immunity is not jurisdictional and thus may be waived); *see also Kumangai v. Isechal*, 1 ROP 587, 589-90 (1989) (expressing disapproval of trial court raising affirmative defenses *sua sponte*). Indeed, as a matter of litigation strategy, legislators might choose purposely to forego this defense. "Legislators are certainly cognizant of the public perception that raising an immunity defense is tantamount to a claim of being above the [law]. Thus, raising a defense of legislative immunity at the outset of litigation is not without its political costs." *Nat'l Ass'n of Social Workers v. Harwood*, 69 F.3d 622, 638 (1st Cir. 1995) (Lynch, J., dissenting).

Here legislative immunity was pleaded in the answer as an affirmative defense but not argued as a basis for summary judgment. "A waiver is an intentional relinquishment or abandonment of a known right."[5] *United States v. Mantas*, 274 F.3d 1127, 1130 (7th Cir. 2001).

[5]In this regard, waiver is distinguishable from forfeiture. Forfeiture occurs when the litigant inadvertently fails to make a timely assertion of a right. In other words, it "is an accidental or negligent omission."

"We may not review waived issues because, technically, there is no error to correct." *Id.* Although we need not determine the Legislative Defendants' rationale for waiving this defense, it is clear to us that it was indeed abandoned and hence we will not consider the argument for the first time on appeal.[6]

Interpretation of § 406

The pertinent language of § 406 states:

> (a) No person may expend, obligate, or certify the expenditure or obligation of any public funds for any purpose in excess of the amount appropriated by law for that purpose. No person may direct or authorize anyone, over whom that person has any supervisory authority, to expend, obligate, or certify the expenditure or obligation of any public funds for any purpose in excess of the amount appropriated by law for that purpose.
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> (c) Any person who violates subsection (a) or (b) of this section shall be:
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> (1) jointly and severally liable to pay to the National Treasury civil damages equal to the greater of $2,500 or the amount of any expenditure or obligation in excess of that appropriated by law, plus interest at the maximum rate allowable by law . . . .

On appeal, the Legislative Defendants argue for the first time that § 406 does not, by definition, apply to the act of voting because a legislative vote is not the equivalent of "expending," "obligating," or "certifying" funds, which are the operative words of the statute. Because the argument apparently did not occur to them until the case was on appeal, the failure to raise this issue below is not an example of waiver, but of forfeiture.[7] This presents us with circumstances similar to *ROP v. S.S. Enters., Inc.*, 9 ROP 48 (2002), where on motion for summary judgment the Trial Division was "not presented with and did not consider the governing theory of law." *Id.* at 52 (quoting *Aguon v. Calvo*, 829 F.2d 845, 848 (9th Cir. 1987)). Nonetheless, because our review was *de novo*, the issue raised was a matter of law, and the argument was made by the appellant in its opening brief so that the opposing party had an opportunity to respond, we reached and decided the issue. These identical factors are present here, so we will consider the argument.

In construing § 406, we apply the rules of construction as set forth in 1 PNC § 202; non-technical words and phrases "shall be read in their context and shall be interpreted according to the common and approved usage of the English language." To "expend" means "to pay out,

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United States v. Walton, 255 F.3d 437, 441 (7th Cir. 2001); *see also Mantas*, 274 F.3d at 1130.

[6]Because the Legislative Defendants prevail in this appeal on statutory grounds, we need not consider when legislative immunity may, if ever, be properly raised for the first time on appeal.

[7]*See* note 5, *supra*.

spend."[8] To "obligate" means, in this context, "to commit (funds, property, etc.) to meet an obligation."[9] To "certify the expenditure of funds" means "to guarantee . . . as to . . . sufficiency of funds to cover payment."[10] What the Legislative Defendants did was to vote to appropriate (or, more accurately, to purport to appropriate) funds. An appropriation is a "set[ting] apart for a specific purpose or use."[11] "Appropriate" is not a synonym for "expend," "certify," or "obligate."[12]

Our view is confirmed by the legislative history surrounding the enactment of § 406. RPPL No. 4-40, § 37 contained the original version of § 406. That section stated:

> No person may expend or obligate, or cause to be expended or obligated, or permit, authorize, direct, demand or request any other person to expend or cause to be expended, or obligate or cause to be obligated, any ⊥67 public funds for any purpose in excess of the amount appropriated by law for that purpose.

Arguably, this language would have prohibited the conduct engaged in by the Legislative Defendants in that they, by voting for NSPL No. 9-01, "authorized," "demanded," or "requested" that capital improvement projects funds be expended for another use. President Nakamura noted the existence of potential practical problems with the section as then worded when he signed the original bill into law, and the Attorney General's view was that the statute could be unconstitutionally vague. The OEK subsequently amended the section in RPPL No. 4-48 and utilized the less expansive language now codified in § 406. Given the history of § 406, we do not believe that the terms "expend," "obligate," or "certify" can be interpreted to mean anything other than their specific dictionary definitions. Under those definitions, neither "expend," nor "obligate," nor "certify" means "vote."

CONCLUSION

We conclude that, as a matter of law, the Legislative Defendants are not jointly liable because of their votes in favor of NSPL No. 9-01. We therefore reverse and remand the case to the Trial Division, with instructions to enter judgment in favor of the Legislative Defendants.

MILLER, Justice, concurring:

I concur fully in the opinion of the Court. I write separately only to suggest that, to the extent that 40 PNC § 406 does not penalize the conduct at issue in this case, there ought to be a law that does. If the $30,000 at issue belonged to Ngiwal State or had come to Ngiwal with no strings attached, the question of whether it was in the public interest to throw a big party would be for the Legislative Defendants in the first instance, and ultimately the voters of Ngiwal, to

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[8]Random House Webster's College Dictionary 470 (1996).
[9]*Id.* at 933.
[10]*Id.* at 222.
[11]*Id.* at 68.
[12]The Special Prosecutor makes an additional argument in which he seeks to employ the definition of "appropriations" within 40 PNC § 302(b), but we also find it to be without merit.

decide. As Justice Michelsen makes clear, however, the Legislative Defendants voted to spend this money on a party (and the Governor spent it) fully aware that it had been given to Ngiwal solely for use on capital improvement projects. If it takes a law that says to state legislators and other state officials, "Money earmarked for capital improvement projects shall only be spent on capital improvement projects and anyone who passes or implements a law to spend the money in any other fashion shall be held personally liable,"[13] then the OEK ought to pass one.

[13]The Court today finds that the Legislative Defendants waived any legislative immunity defense they might have asserted, and therefore declines to address the issue. The question remains open, but I am extremely skeptical that any such defense, whether arising from a state constitution or derived from the common law, can survive a national law that specifically includes state legislators within its reach.